Supreme Court, U. S.
FILED
OCT 11 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-378

THE BANK OF NEW JERSEY,

Petitioner,

v.

NORTHWESTERN NATIONAL INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT NORTHWESTERN NATIONAL INSURANCE COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

JOHN R. MCCONNELL,
JOSEPH H. HUSTON, JR.,
Attorneys for Respondent,

MORGAN, LEWIS & BOCKIUS
2100 The Fidelity Building
Philadelphia, Pa. 19109
(215) 491-9413

PRESS OF ALLEN, LANE & SCOTT, INC., PHILADELPHIA

TABLE OF CONTENTS

PAGE

TABLE OF CITED AUTHORITY ii

I. SHORT SUMMARY OF THE CASE

Petitioner bank seeks review of a Court of Appeals' reversal of a District Court's judgment in a diversity case involving an issue solely of New Jersey Law.

The District Court held that the bank was entitled to demand the renewal of a bond issued by Respondent because the bank had the right in certain circumstances to demand "additional collateral" under the terms of the note to receive which the bond had been issued.

The Court of Appeals reversed, holding that the bank's action was contrary to the express terms of the note and the bond because (1) the demand was for an extension of the same collateral, not for "additional collateral," and (2) the bond expressly was for one year only and gave to Respondent alone the right to decide to renew.

The bank now petitions for a writ of certiorari on the theory that a necessary implication of this decision on an issue of law, concededly not addressed by either court, conflicts with dicta from a 1926 opinion of a New Jersey trial court 1

II. BRIEF STATEMENT OF THE FACTS 2

III. STATEMENT OF THE ISSUE

Should the Court grant review on certiorari where the decision of a Court of Appeals in a diversity case involves a construction only of local law in a case most unlikely to recur wherein no reported authority was found ever to have considered the question? 9

IV. ARGUMENT

The petition for writ of certiorari should be denied because:

A. The questions presented for a review are solely of state law, arise out of facts most unlikely to recur and are of importance only to the litigants 10

B. The Bank concedes that the issue presented has never before been decided and that neither the Court of Appeals nor the District Court addressed the issue which the bank claims gives rise to the conflict with New Jersey law 16

C. The Court of Appeals reversed the District Court's holding because it was contrary to the language of the documents in issue and the facts stipulated by the parties 23

V. CONCLUSION

The petition for a writ of certiorari should be denied 29

TABLE OF CITED AUTHORITY

I. CASES — PAGE

Appalachian Power Co. *v.* American Inst. of CPA's, 80 S. Ct. 16, 4 L. Ed. 2d 30 (1959) (Brennan, J. Circuit Justice) 13

The Bank of New Jersey *v.* Northwestern Nat'l Ins. Co., Civ. No. 929-72 (D.N.J., opinion filed Dec. 5, 1975) *rev'd*, No. 76-2069 (3d Cir., opinion filed June 13, 1977) ..... Passim

Bivens *v.* Six Unknown Named Agents, 403 U.S. 388 (1971) 19

Byerly *v.* Randolph, 103 N.J.L. 240, 133 A. 40 (Sup. Ct. 1926 ..... 3, 11, 19, 20, 21, 22

Dick *v.* New York Life Ins. Co., 359 U.S. 437, 437 (1959) (Frankfurter, J., dissenting) 13, 14, 15

Erie R.R. *v.* Tompkins, 304 U.S. 64 (1938) 18

Francis *v.* Southern Pac. Co., 333 U.S. 445 (1948) 15

General Box Co. *v.* United States, 351 U.S. 159 (1956) 12, 15, 17

Gibson *v.* Phillips Petroleum Co., 352 U.S. 874, 876 (1956) (per curiam) (Frankfurter, J., dissenting) 12

King *v.* Order of United Comm. Trvlrs., 333 U.S. 153 (1948) 20

MacGregor *v.* State Mutual Life Assur. Co., 315 U.S. 280 (1942) (per curiam) 17

Meredith *v.* Winter Haven, 320 U.S. 228 (1943) 15, 17

NLRB *v.* Sears, Roebuck & Co., 421 U.S. 132 (1975) 19

Propper *v.* Clark, 337 U.S. 472 (1949) 13

Rice *v.* Sioux City Mem. Park Cem., Inc., 349 U.S. 70 (1955) 13, 15

Sims *v.* United States, 359, U.S. 108 (1959) 13

Six Companies of Calif. *v.* Joint Highway Dist. No. 13, 311 U.S. 180 (1940) 19

United States *v.* Estate of Donnelly, 397 U.S. 286 (1970) 19

II. STATUTES

UCC § 1-208, N.J. Stat. Ann. tit. 12A, § 1-208 (1962) 16

UCC § 3-118 (f), N.J. Stat. Ann. tit. 12A, § 3-118 (f) (1962) 20

III. CONSTITUTIONS

N. J. Const. art. VI, §§ 1, 5 (1899) 19

I. SHORT SUMMARY OF THE CASE

Petitioner bank seeks review of a Court of Appeals' reversal of a District Court's judgment in a diversity case involving an issue solely of New Jersey law.

The District Court held that the bank was entitled to demand the renewal of a bond issued by Respondent because the bank had the right in certain circumstances to demand "additional collateral" under the terms of the note to receive which the bond had been issued.

However, the Court of Appeals reversed, holding that the bank's action was contrary to the express terms of the note and the bond because (1) the demand was for an extension of the same collateral, not for "additional collateral," and (2) the bond expressly was for one year only and gave to Respondent alone the right to decide to renew.

The bank now petitions for a writ of certiorari asserting that a necessary implication of this decision on an issue of law, concededly not addressed by either the trial court or the appellate court, conflicts with dicta from a 1926 opinion of a New Jersey trial court.

The petition for a writ of certiorari should be denied because the questions presented for review are solely of state law, arise out of facts most unlikely ever to recur, and are of importance only to the litigants.

Moreover, the bank concedes that the issue presented has never before been decided and that neither the Court of Appeals nor the District Court addressed the issue which the bank now claims gives rise to the conflict with New Jersey law.

Finally, the Court of Appeals reversed the District Court's holding because it was contrary to the language of the documents in issue and the facts stipulated by the parties.

Therefore, Respondent respectfully submits that the petition for a writ of certiorari should be denied.

II. BRIEF STATEMENT OF THE FACTS

By Opinion and Order dated June 13, 1977, the United States Court of Appeals for the Third Circuit reversed the grant of summary judgment by the United States District Court for the District of New Jersey in favor of Petitioner, The Bank of New Jersey (hereinafter referred to as "The Bank") and against Respondent, Northwestern National Insurance Company (hereinafter referred to as "Northwestern") upon a stipulated record of fact in a case involving the construction of loan documents drafted by the parties to suit the particular needs of a real estate financing transaction. The Court of Appeals held that a creditor who has accepted a one-year surety bond as collateral for a five-year loan cannot use the impending expiration of the bond as grounds for accelerating the entire debt in an attempt to force the surety to renew its bond. The court in its Opinion, noted that:

> [t]he only question before us is whether the Bank's demand for an extension of Northwestern's bond was a demand for "additional collateral" within the meaning of the note's acceleration clause. (Cert. App. 8a[1])

The Bank has now petitioned this Honorable Court to issue a Writ of Certiorari to review the Court of Appeals' decision. The asserted basis for the necessity of this Court's review under Supreme Court Rule 19 is that the Court of Appeals decided an important state question in a manner in conflict with applicable state law. It is the assertion of The Bank that the conflict arises between what The Bank believes is a necessary implication of the holding on one hand, and dicta appearing in the case of *Byerly*

[1] References to the Appendix to the Petition for Writ of Certiorari have been designated "Cert. App." References to the short Appendix upon which the Third Circuit based its decision, which included the entire stipulated record, have been designated "App."

v. *Randolph*, 103 N.J.L. 240, 133 A. 40 (Sup. Ct. 1926), the decision of a trial court on a motion for summary judgment, on the other. The Bank asserts this conflict despite the fact that neither court below addressed this issue, nor did either so much as cite *Byerly* v. *Randolph* in its opinion. The Bank contends that the following facts give rise to the conflict:

In February, 1971, The Bank agreed to lend $250,000 to Brokers Financial Corporation (hereinafter referred to as "Brokers") over five years, so that Brokers could complete construction of an apartment building in Ventnor, New Jersey. The indebtedness was evidenced by a one-year note bearing interest at the rate of 8% per annum. The note was renewable solely at the borrower's option so long as interest payments were made as agreed during the first year. There was to be no reduction of principal until the second year of the loan. (App. 41a-45a)

As collateral, The Bank required the assignment of a $550,000 second mortgage on the apartment building and a surety bond covering the first year of the loan in the full amount of $250,000. Brokers obtained the proposed form of a bond from Northwestern and forwarded it to The Bank on March 31, 1971 with a covering letter requesting The Bank to have The Bank's attorneys "complete this [bond] in a form acceptable to them." (Cert. App. 2a-3a; App. 46a)

On April 7, 1971, Brokers executed and delivered to The Bank a note payable to the order of The Bank one year after date. The printed form note reflected the agreement that only monthly interest was to be paid during its term and included the following typed provision which had been especially inserted by the parties:

> Although written for a period of 1 year, if interest is paid as agreed, this Note may be renewed. (App. 31a)

The note also contained an acceleration clause, set forth in full by the Court of Appeals in a footnote (Cert. App. 3a n. 3), which provided in pertinent part:

> [E]ach of the undersigned hereby agrees, whenever the total value of the collateral so held by the [Bank] shall be insufficient in character, kind or amount in the [Bank]'s sole option and discretion to cover all indebtedness and liabilities as a foresaid of any of the undersigned to the [Bank] . . . to deposit with the [Bank] additional collateral to the satisfaction of the [Bank]. (App. 31a)

On April 16, 1971, Northwestern executed and delivered to The Bank the financial guarantee bond subject of The Bank's claim, being the same as had been delivered with the letter of March 31, 1971 for inspection and approval by The Bank's attorneys.

The bond, the terms of which are set forth at length in a footnote to the Court of Appeals' opinion (Cert. App. 3a-4a n. 5), provided, as relevant here, the following:

> 7. The term of this instrument is and shall be one year. If Principal exercises its right to renew the note Surety's obligation hereunder shall not thereby automatically be renewed but may be renewed at the option of Surety.
>
> 8. If, during the term of the note, Principal defaults in the payment of any monthly installments of interest, Obligee shall notify Surety forthwith, and Surety shall have ten days after receipt of such notice in which to cure the default and thereby preserve all of the Principal's rights which, in that event, shall remain in full force and effect. (App. 35a-36a)

It is undisputed that Brokers made all interest payments through November, 1971. Thereafter, in March of

1972, The Bank asked Brokers to obtain an extension of Northwestern's bond. When no renewal bond was presented, The Bank's attorneys notified Northwestern for the first time that there had been "a default in the payment of interest," recited verbatim the language of paragraph 8 of the bond, and requested payment of the interest for November through March. (App. 57a)

It is also undisputed that in accordance with the terms of the bond, when notified that Brokers had failed to make the payments from November, 1971 through March, 1972, "Northwestern . . . made timely payment pursuant to the Bond and cured Brokers' default in failing to pay interest." (Cert. App. 6a, 7a n. 14; App. 58a-59a). *See* Petition for Writ of Certiorari at 4.

Thereafter, The Bank notified Brokers that "due to the default in the note . . ., we do not wish to extend the loan and are hereby demanding payment be made prior to 3:00 p.m. on Friday, April 7, 1972." (App. 60a)

However, because all its rights under the note had been preserved by Northwestern's payment of the interest arrears, and hence it still enjoyed the right to renew the note, Brokers mailed a check for the April interest to the Bank by letter dated April 6, 1972 and stated that it was renewing the note. The letter further stated, "Should you desire that this renewal be further formalized, please let me know so that I can make any necessary arrangements." (App. 64a)

The Bank never required any further formalization, nor did it at any time state that Brokers had failed to renew the note effectively by failing to provide a renewal note or otherwise.

However, The Bank returned the tendered interest payment and repeated its refusal to extend the loan "due to the default in the note," never so much as mentioning the request for "additional" collateral. (App. 65a)

Brokers refused to pay the full balance of the note at that time and therefore The Bank, on April 11, 1972, made demand upon Northwestern for payment of the principal sum plus interest from March 7th. (App. 66a) Northwestern, however, also refused to pay for the same reason, pointing out that there had been no uncured default in the note that could have obligated it to pay on its bond. The Bank then filed suit in the United States District Court for the District of New Jersey, on the basis of diversity of citizenship. Hence, the case was governed by New Jersey law. After discovery, the case was submitted to the District Court on cross-motions for summary judgment based upon a stipulated record of fact.

The Court of Appeals noted that while the lower court had found that the default in interest payments had been cured in accordance with the terms of the bond (Cert. App. 7a *citing* App. 77a), it had concluded that there had been another instance of default which obligated Northwestern to pay on the bond. This was Broker's failure to exact from Northwestern a renewal of the bond, although the plain terms thereof limited the term of the bond to one year and vested the right to decide to renew the bond solely in Northwestern. In the words of the Court of Appeals:

> As the district court viewed the case, the default in interest payments gave the Bank a substantial basis for believing its prospects for payment were impaired. The Bank then justifiably requested "additional collateral" in the form of an extension of Northwestern's bond, which was due to expire. When Brokers failed to produce this "additional collateral," said the district court, the note fell due in full under the acceleration clause; Brokers' subsequent refusal to pay amounted to a default for which the Surety, Northwestern, was liable on its bond. (Cert. App. 7a-8a)

However, the Court of Appeals reversed and entered judgment for Northwestern because "the court below improperly interpreted the note's acceleration clause . . . ." (Cert. App. 8a) Making reference to the record, the Court of Appeals noted that every reference to "the default" in the correspondence between the parties referred only to the interest arrears from November to March, which had been cured, and that never had The Bank relied upon nor made a demand relating to the additional collateral clause. (Cert. App. 9a) The essence of the decision of the Court of Appeals appears in the following paragraph:

> Even apart from the inquiries into what the parties "really" did, these facts simply cannot be stretched to fit the theory of the court below. There never came a time during the one-year term of the note when the collateral was insufficient to cover all the indebtedness; in fact, Northwestern's bond alone covered the full face amount of the note. The Bank's request for a new bond—also in the amount of $250,000—to cover the second year of the note, demonstrated that the first-year collateral was sufficient. The Bank, then, was not requesting additional collateral to secure the indebtedness evidenced by the one-year note to which the bond referred. (Cert. App. 9a)

Limiting its decision to the basis of the lower court's judgment for The Bank, the Court's decision was:

> We hold only that the Bank's right to demand "additional collateral" cannot be understood to mean that the Bank could demand a "temporal extension of the *same collateral*," where the parties explicitly bargained for the expiration of the collateral—the bond— at a precise date within the term of the principal debt and where that agreed-upon collateral currently covered the full indebtedness. (Cert. App. 12a)

The Bank now appeals that decision, arguing, despite the limited holding of the Circuit Court, that this decision is in conflict with the case of *Byerly* v. *Randolph*. The Bank argues that in holding as it did, the Court of Appeals necessarily held implicitly that the note had been effectively renewed by Brokers. This The Bank argues despite the court's statement of its limited holding.

As Northwestern expects to demonstrate within, even assuming the accuracy of every one of The Bank's premises, this case is a peculiar one which rises and falls upon the unique wording of the documents at issue and the acts of the parties. It involves questions solely of New Jersey law and it its most unlikely that a case such as this will ever again arise.

The Bank makes no contention that the decision of the Circuit Court was contrary to the decision of any appellate court of New Jersey, that it infringed upon any federal interest, or that it involved the denial of any constitutional right. In this instance, then, the Court of Appeals sat as the court of last resort on an issue solely of state law and Northwestern respectfully submits that therefore, in accordance with the long-standing rule of this Court, the case is not appropriate for review on certiorari.

III. STATEMENT OF THE ISSUE

Should the Court grant review on certiorari where the decision of a Court of Appeals in a diversity case involves a construction only of local law in a case most unlikely to recur wherein no reported authority was found ever to have considered the question?

IV. ARGUMENT

The Petition for a Writ of Certiorari should be denied because:

A. The questions presented for review are solely of state law, arise out of facts most unlikely to recur and are of importance only to the litigants.

This is a diversity action involving questions solely of New Jersey commercial law.

The issues arise out of a three-party transaction involving principally two documents, each of which had been specially drafted and tailored to the needs of the parties in the unique circumstances of the transactions involved.

The Bank demanded that Brokers obtain from Northwestern an extension for an additional year of the subject bond which was, on its face, expressly limited to a one-year term with the option to renew resting solely within Northwestern's discretion.

Each of these foregoing factors alone renders this case inappropriate for review on certiorari because 1) on questions of state law, the determinations of the Courts of Appeals are final except in extraordinary circumstances not present here: 2) the facts of the case presented are most unlikely to recur: and 3) since the questions presented neither are "special and important" as required by Supreme Court Rule 19, nor have application to cases other than the instant case, review by this Court will constitute merely an appeal on the merits to decide questions of importance only to The Bank of New Jersey because it believes the Court of Appeals erred in deciding its rights.

Therefore the Petition for Writ of Certiorari should be denied.

In its Petition for Writ of Certiorari, The Bank presents two questions which it deems at issue in this case.

The first is whether the language of a promissory note permitting a demand for additional collateral may encompass a demand which is not for additional collateral, but rather is for the extension of the same collateral, in the face of language expressly prohibiting same. This is a question only of state law and is a question which no state court anywhere has addressed in a reported opinion.

In its second question, The Bank presents the issue thus: "Under the common law of New Jersey may a debtor renew a promissory note without tendering to the creditor a renewal note in the same form as the original note duly executed by the maker of the note?" Again, this presents to this honorable Supreme Court, the body vested with the power and duty to decide important questions of national significance, a question solely for the Supreme Court of New Jersey or its inferior courts. In this instance as in the last, no reported case in New Jersey has ever addressed the issue of whether or not in any circumstances a renewal note must be presented in order to renew a loan. The Bank relies upon dicta found in a decision of a trial court in the case of *Byerly* v. *Randolph*, 103 N.J.L. 240, 133 A. 40 (Sup. Ct. 1926), as the strongest authority in support of its position that a renewal note is needed.

The Supreme Court of the United States has long indulged the view that the "practice of deference to [the Courts of Appeals and District Courts' determination of local law] should generally render unnecessary review of their decisions in this respect." *Cort* v. *Ash*, 422 U.S. 66, 73 n. 6 (1975). Indeed, even where a determination of state law carries significant impact upon constitutional rights, the Supreme Court will defer to the findings of the lower courts on state law and will not disturb them, "even if an examination of the state-law issue without [their] guidance might have justified a different conclusion." *Bishop* v. *Wood*, 426 U.S. 341 (1976)

It has long been the rule for review of cases on certiorari that the Court will not review questions of state law in diversity cases because the Courts of Appeals sit as the federal courts of last resort on such issues and, the Judges of such courts being regularly presented with the questions of the applicable local law, are more expert in its application than the Supreme Court. *E.g., General Box Co.* v. *United States*, 351 U.S. 159, 165 (1956). In the words of Mr. Justice Frankfurter:

> This Court is not a Court to determine the law of the 48 states. Error on the part of a Court of Appeals in applying the local law of any one of the 48 states involves injustice to a particular litigant, whether it is a personal injury case or any other case. If the claim of injustice in a particular case arising solely out of diversity jurisdiction justifies review by this Court, it justifies it in every case in which on the surface view of the record this Court feels a Court of Appeals may have been wrong in its ascertainment of local law.
>
> . . . The Supreme Court of the United States is designed for important questions of general significance in the construction of federal law and in the adjustment of the serious controversies that arise inevitably and in increasing measures in a federal system like ours. These questions are more than sufficient in volume and difficulty to engage all the energy and thought possessed by the Court; it should not be diverted by the correction of errors in local controversies turning on particular circumstances. *Gibson* v. *Phillips Petroleum Company*, 352 U.S. 874, 876-77 (1956) (Frankfurter, J., joined by Harlan, J., dissenting).

As Mr. Justice Frankfurter noted in another well-known dissent, the Act of 1891 creating the Courts of Appeals took away from the Supreme Court the task of acting as the Court of last resort as of right and instead vested the Courts of Appeals with a position "equal in dignity to the Supreme Courts of the several states." *Dick* v. *New York Life Insurance Company*, 359 U.S. 437, 448 (1959) (Frankfurter, J., dissenting), *citing* H.R. Rep. No. 1295, 51st Cong. 1st Sess. 3. The purpose of this Act was "to enable the Supreme Court to discharge its indispensable function . . . by relieving it of the duty of adjudication in cases that are important only to the litigants." *Id.*

In short, so long as a Court of Appeals' "conclusion appears to be founded on reason and authority, . . . under familiar principles [its conclusion] will be accepted here." *Sims* v. *United States*, 359 U.S. 108, 114 (1959), *citing Propper* v. *Clark*, 337 U.S. 472, 486-87 (1949). *Accord, Appalachian Power Co.* v. *American Institute of CPA's*, 80 S. Ct. 16, 4 L.Ed. 2d 30 (1959) (Brennan, J. Circuit Justice).

Moreover and more importantly, this Court does not review cases which are of importance only to the litigants and which have no reasonable probability of recurring. Even where certiorari has been granted initially to review a case, if subsequent developments virtually preclude the recurrence of the problem in the future, the Court will reverse its grant of certiorari even if it means a hardship to the litigants.

For example, in *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955), petitioners sought a writ of certiorari to review the Iowa Supreme Court's decision that a contract provision prohibiting the interment of an American Indian in a cemetery, while unenforceable, could nonetheless be used as a defense to an action by the decedent's survivors for mental suffering where the decedent's burial was refused at the gravesite

by the owner of the cemetery after the rights of burial had been administered. The Court had heard full argument on the merits and had affirmed the Iowa Supreme Court's decision in an evenly divided opinion. On a petition for rehearing, the Court's attention was focused on a statute enacted in Iowa after the commencement of the litigation. Noting that "[t]his Iowa statute barred the ultimate question presented in this case from again arising in that state" the Court vacated its opinion and reversed the grant of certiorari, dismissing it as improvidently granted. 349 U.S. at 73.

The Court so held because the constitutional issues and issues of substance and import required by Rule 19, which had first appeared to exist, were therefore no longer involved since the issues in the case could not again be presented. *Id.*

In the instant case, it is respectfully submitted that the unique documentation written with an eye toward a particular transaction and the peculiar financial problems of Brokers, coupled with the acts of the parties during the period March 1, 1972 through April 15, 1972, make it virtually certain that this case will never repeat itself.

It is evident, of course, that the issue presented by this case is novel and interesting. But that alone does not constitute the case one appropriate for decision by the United States Supreme Court, because such cases must have a real and significant value to the public interest generally and not merely to the litigants and must, in the view of the Court, admit of an impact greater than merely a precedent on the merits.

> The decision in each case is a strictly particular adjudication—a unique case since it turns on unique facts—and cannot have precedential value. Of course, it is of interest, perhaps of great importance to the parties, only as such and not independently of any general public interest. *Dick* v. *New York Life Insurance Company,* 359 U.S. 437, 457 (1959) (Frankfurter, J., dissenting).

Nearly every case presented to any court presents issues which have not been decided before on the particular facts of the case. Indeed, were the contrary true, it is most likely that the parties would never have reached the courthouse door. Therefore, unless the case peculiarly affects the public interest and involves questions federal in nature, they are not reviewed by this Court:

> "Special and important reasons" imply a reach to a problem beyond the academic or the episodic . . . [T]his Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 74 (1955).

Where no state court decision exists on an issue presented, as in the instant case, the Court of Appeals' holding will not be disturbed, since the panel comprises people whose daily business involves passing upon questions of the law of the States within the circuit. *General Box Co.* v. *United States,* 351 U.S. 159, 165 (1956). In fact, in such circumstances, it is the duty of the Court of Appeals to decide such questions as the court of last resort, even in a vacuum created by the absence of state law on the subject. *Meredith* v. *Winter Haven,* 320 U.S. 228, 237 (1943). In such cases, unless the Court of Appeals commits plain error in making its decision of local law, the Supreme Court has stated that it is without power to overrule that decision. *Francis* v. *Southern Pacific Co.,* 355 U.S. 445, 447-48 (1948).

In the instant case, The Bank believes that the Court of Appeals' holding should have been in its favor. It believes that it acted permissibly in the transactions at

issue. While it commends to the Court in Point II of its Petition the idea that "[t]he question of The Bank's right to demand additional collateral is an important question of substantive law which has never previously been decided under the Uniform Commercial Code," it is plain that that is not the issue presented. Rather, the question The Bank presents is only whether in these particular circumstances The Bank's acts were in accord with the law of New Jersey as stated in the Uniform Commercial Code; that is, a question the review of which need go no further than the facts of this case.

It is undisputed that the positive law of New Jersey is embodied in Section 1-208 of the Uniform Commercial Code, N.J. Stat. Ann. § 12A: 1-208 (1962). Northwestern does not, nor did it ever, question The Bank's right to demand additional collateral for the Brokers' transaction. What it did question, however, was whether or not The Bank's actions constituted a demand for "additional" collateral. Northwestern therefore respectfully submits for the reasons set forth above that The Bank seeks only another level of review on what it views as its right to recover in this case. The asserted "important questions of general implication" which The Bank has set forth as involved herein are in this case illusory.

Therefore, Northwestern respectfully submits that the Petition for Writ of Certiorari should be denied.

B. The Bank concedes that the principal issue presented has never before been decided and that neither the Court of Appeals nor the District Court addressed the issue which The Bank claims gives rise to the conflict with New Jersey law.

The Bank contends that review on certiorari is appropriate herein for two reasons. First is the "important question of substantive law which has never previously

been decided under the Uniform Commercial Code" embodied by the Court of Appeals' decision that The Bank had no right to demand a renewal of the nonrenewable bond. The Bank recognizes and concedes that "the Court below by its own admission made a precedent setting determination in a previously uncharted area of the law under the Uniform Commercial Code." Petition for Writ of Certiorari at 8.

Moreover, as to this undisputed point, The Bank asserts that "the question which has been raised is of such importance that it is deserving of review by this court." Petition for Writ of Certiorari at 8. Indeed, The Bank continues that "[t]he point in controversy raises an important question as to the manner in which a commercial institution may analyze the security which it holds for a loan . . . . and that this question is deserving of certiorari in light of the fact, as stated by the majority opinion, that this issue has never been passed upon by any other court." Petition for Writ of Certiorari at 9, 10.

As noted previously, the Courts of Appeals are obliged by virtue of Congress' creation of diversity jurisdiction to decide questions of state law even where the question is unsettled or where no state authority governing the case exists. *Meredith* v. *Winter Haven,* 320 U.S. 228 (1943). In such circumstances, the Supreme Court will ordinarily decline to address the Court of Appeals' finding of local law, even where the latter has reversed the decision of a district court judge having considerable experience and familiarity with the subject matter at hand. *General Box Company* v. *United States,* 351 U.S. 159 (1956). *Accord, MacGregor v. State Mutual Life Assurance* Co., 315 U.S. 280 (1942) (per curiam).

Part of the reason for this is the principle of federalism which leaves to the courts and legislatures of the several States the task of declaring substantive law. Even

were the Supreme Court of the United States to declare the rule in this case to be contrary to the decision of the Court of Appeals, the courts of New Jersey and of each of the other States would be free to decline to follow that ruling and adopt the holding of the Court of Appeals, or for that matter any rule between the two:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by a Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in nature or "general," by they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such power upon the federal courts. *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64, 78 (1938).

Therefore, it is respectfully submitted that the Court of Appeals' interpretation of local law is final. *See Black* v. *Cutter Labs.,* 351 U.S. 292, 299-300 (1956).

The Bank's second point is that the Court of Appeals held by necessary implication that given the facts and circumstances of the instant case, Brokers effectively renewed the note through its attorney by tendering the interest for April 1972 and stating that the note was renewed. It is The Bank's contention that this holding (1) conflicts with the law of New Jersey and (2) is erroneous.

However, as The Bank must and does concede, neither lower court so much as addressed the issue of renewal. Petition for Writ of Certiorari at 5. This is fatal to The Bank's petition, as it is the long-settled rule of the

Supreme Court that where it is "without a lower court opinion on the legal issue . . . [u]nder such circumstances, we normally decline to consider a legal claim . . ." *NLRB* v. *Sears Roebuck &Co.,* 421 U.S. 132, 164 (1975) (citations omitted). *Accord, Wood* v. *Strickland,* 420 U.S. 308, 327 (1975); *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388, 398-99 (1971); *United States* v. *Estate of Donnelly,* 397 U.S. 286, 295 n.5 (1970).

Nontheless, considering the merits of the claim, The Bank's contention is that only an unexpressed necessary holding gives rise to the conflict with New Jersey law, despite the court's disclaimer of rendering more than a limited decision and the fact that its discussion was limited to the issue of the operation of the acceleration clause. It is not asserted, for example, that the Court of Appeals ignored applicable state precedent, nor that it rejected the state rule in favor of its own determination of the law, nor that the Court of Appeals was unmindful in any respect of the law of New Jersey. *Compare, e.g., Six Companies of California* v. *Joint Highway District No. 13,* 311 U.S. 180 (1940).

The Bank contends that this case is controlled by *Byerly* v. *Randolph,* 103 N.J.L. 240, 133 A. 40 (Sup. Ct. 1926). The Bank asserts that *Byerly* v. *Randolph* held "that the tender of a renewal note is necessary to properly effectuate the renewal of a promissory note" Petition for Writ of Certiorari at 7. But the Bank's argument is misplaced for two reasons:

First, even assuming that the rule of that case is as The Bank has stated, the Court of Appeals was not bound by it because in 1926, the year of decision, the Supreme Court of New Jersey was a trial court with only certain limited appellate court functions. N.J. Const. art. VI, §§1, 5 (1844). In the *Byerly* case, the Supreme Court sat as a trial court, with but one judge presiding, deciding the case

on plaintiff's motion for summary judgment. In such circumstances, the pronouncement of such a court is not deemed to be the authoritative statement of the law of the jurisdiction and therefore the federal courts are not bound thereby. *King* v. *Order of United Comm. Trvlrs.* 333 U.S. 153, 161 (1948)

Moreover, in the 50 years which have elapsed since the decision of the *Byerly* case, the New Jersey legislature has seen fit to enact as part of its Uniform Commercial Code the following provision:

> The following rules apply to every instrument: Unless otherwise specified, consent to extension authorizes a single extension for not longer than the original period. A consent to extension, expressed in the instrument, is binding on secondary parties and accommodation makers. UCC § 3-118(f), N.J. Stat. Ann. tit. 12A, § 3-118(f) (1962).

This section anticipates "instruments" such as the note executed by Brokers in favor of The Bank which themselves contain provisions for extensions. The section provides that contrary to the common law rule excusing holders and other secondary parties upon the extension of the maker's obligation, such instruments, even when negotiated to others and signed by secondary parties, retain the maker's right and obligate the secondary party to acquiesce in an extension. A provision for renewal in such a note would be without effect and the instrument void of negotiability or value if a replacement note had to be issued upon renewal, given the problems attendant execution and delivery of the new note by the maker to the holder.

However, neither of the foregoing contentions need be addressed since *Byerly* v. *Randolph* does not stand for the proposition which The Bank asserts. At best, the language set forth in the Petition for Writ of Certiorari is obiter dictum. In *Byerly,* the court stated that "The question to

be determined is, what legal effect is to be given to the words 'renewal until paid'?" 103 N.J.L. at 240, 133 A. at 40. The court further wrote in deciding that limited question:

> For the defendant it is argued that the renewal may go on indefinitely at his will, and that his only legal obligation is to renew the note at each time when it falls due. This is a palpable absurdity. The very term "Renewal until paid" implies that the note shall be paid at some period of time. *Id.* at 241, 133 A. at 40.

The facts in *Byerly* were that after the original three-month note between the parties was renewed, more than three years elapsed before plaintiff made a demand. Defendant's defense was that the words "renewal until paid" written upon the face of the note entitled him to indefinite renewals until he saw fit to pay. This is the "palpable absurdity" to which the court alluded. Indeed, at the time that plaintiff made his demand of the defendant, there was no renewal or offer of renewal made by the defendant. It is evident from the court's opinion that the offer to renew was not made until the action was brought:

> The defendant's offer to renew it which he sets up as a defense to a recovery by the plaintiff, in the present action, is of no avail to the defendant since he breached the agreement to renew it." *Id.,* 133 A. at 40.

The remainder of the court's opinion makes it plain that the only contention addressed in that case was defendant's theory that "renewal until paid" gave him the option to make unlimited renewals, the court ultimately holding that that agreement "would be unenforceable because of indefiniteness and uncertainty." *Id.* at 242, 133 A. at 41.

It is The Bank's contention that "assuming that Brokers retained the right to renew it would have had to tender a renewal note in order to accomplish its purpose," but did not. Petition for Writ of Certiorari at 7.

However, the contrary is true. The District Court found as fact that on April 6, 1972 Brokers "forwarded $1,666.67 as the interest for March 7, 1972 to April 7, 1972 and stipulated their desire to renew the note." (Cert. App. 27a (¶10)). As is evident from the very letter which the court found Brokers had sent, Brokers did indeed tender a renewal note: "Should you desire that this renewal be further formalized, please let me know so that I can make any necessary arrangements." (App. 64a). The Bank never stated that it required any further formalization, nor that it was rejecting the renewal of the note for want of "further formalization."

It is therefore respectfully submitted both on these facts and on the law as stated in UCC section 3-118(f), that Brokers was not obliged to tender a renewal note since the note between the parties bore on its face the agreement to renew. In any event, Brokers in fact offered to present such note if The Bank were to require it, and hence "tendered the note," if such arguably can be deemed to be required by *Byerly* v. *Randolph*, which, it will be remembered, concluded the dictum upon which The Bank relies with the statement "defendant's offer to renew . . . which it sets up as a defense to recovery by the plaintiff in the present action is of no avail to the defendant since he breached the agreement to renew it" by failing to *offer* to renew at maturity.

In sum, the principal issue sought to be reviewed is one upon which no state court has passed. The issue asserted to give rise to a conflict with New Jersey laws was not addressed by either lower court here, nor has an appellate court of that state decided it, nor does the case relied upon by The Bank stand for the proposition advanced.

Therefore, the Petition for Writ of Certiorari should be denied.

C. The Court of Appeals reversed the District Court's holding because it was contrary to the language of the documents in issue and the facts stipulated by the parties.

In this case the District Court held that The Bank was entitled to demand a renewal of Northwestern's bond even though the bond by its terms precluded such demand by The Bank. The District Court held that The Bank enjoyed this right by virtue of the "additional collateral" clause contained in the note, which permitted The Bank in certain circumstances to demand Brokers to reduce the liability owed to The Bank or to post additional collateral with The Bank so that The Bank would be satisfied with the loan. (Cert. App. 25a-26a, 29a)

The Court of Appeals reversed because the facts of the case "simply [could] not be stretched to fit the theory of the court below." (Cert. App. 9a) The Court of Appeals found that while The Bank did enjoy the right to demand "additional" collateral, it "was not requesting additional collateral to secure the indebtedness evidenced by the one-year note to which the bond referred . . . . ," but rather was requesting "a 'temporal extension of the *same* collateral' . . . ." (Cert. App. 9a, 12a). The Court of Appeals so held because the District Court had based its decision that The Bank had the right to demand additional collateral upon its finding that the five-month default in the payment of interest by Brokers gave The Bank reasonable grounds for feeling insecure as to the collateral for the loan, despite the fact that, as argued below and found by the Court of Appeals, "it is undisputed that the default in interest payments was timely cured and formed no basis for holding Northwestern liable on its bond." (Cert. App. 8a)

Therefore, absent the ability to rely upon the cured interest arrears as a basis for requesting additional collateral, The Bank was obliged to rest its action on some other cognizable act of default.

The Court of Appeals therefore considered whether or not the impending expiration of the bond itself reasonably could be relied upon by The Bank in accelerating the note. The District Court had held that "Brokers Financial Corporation's substantial default in interest payments during the first year of the five-year loan should have alerted borrower and surety alike that the lender would refuse renewal of the note and demand acceleration of payment on the prospect of receiving less security in the second and ensuing years of the loan than had been initially demanded as a condition of the loan. It was at that point that The Bank demanded the past interest and the extension of a Financial Guarantee Bond." (Cert. App. 29a)

Since the bond was in the amount of $250,000 during the entire term of the note, and since the collateral requested for the period following the expiration of the bond was the very same bond in the same amount of $250,000, the Court of Appeals held that the request was not for additional collateral but rather an extension of the same collateral.

While in other circumstances this might have been justified, Northwestern argued below and the Court of Appeals further so held that this act of The Bank was precluded by the plain terms of the bond which provided (a) that the bond was for one year only and (b) that only Northwestern enjoyed the right to decide whether to renew or not. (Cert. App. 11a n. 20) The Court of Appeals held that to permit The Bank to call the loan and demand payment on the bond by virtue of the impending expiration of the bond alone was to contradict the express terms thereof and "would be to convert the very fact of executing a bond for a term shorter than that of the principal debt into a sufficient condition for the declaration of a default which triggers liability on the bond." (Cert. App. 10a)

> If the impending lapse of that bond after one year was itself a condition creating present insecurity (and hence default), then the express language limiting the bond to a term of one year and vesting the renewal option exclusively in the surety was meaningless; unless Northwestern extended the bond at The *Bank's option*, the default would occur. Thus, following the logic of the court below, sureties effectively would be precluded from executing guarantee bonds for terms shorter than that of the principal debt; refusal to extend for the future would simply lead to immediate insecurity and default, triggering liability on the bond. (Cert. App. 10a-11a).

The holding of the Court of Appeals was the only one justified by the facts of this case because the circumstances in which the printed acceleration provision was to apply never occurred. That is, in the opinion of The Bank the total value of the collateral never was insufficient to cover the indebtedness of the note. The parties never intended the acceleration provision to apply to these facts as is borne out by the fact that The Bank never invoked that provision nor referred to it, and by its actions showed that it did not apply.

This latter point is perhaps the most important, because at all times during the subject events, The Bank was represented by able counsel and was itself a sophisticated, long-established business enterprise. Yet neither The Bank nor its counsel ever at any time prior to the institution of the proceedings in the court below invoked, referred to or relied upon the acceleration clause. This in itself is abundant evidence that the parties to this agreement never intended the acceleration clause to apply to these circumstances. The conduct of the Bank makes this evident.

It should be remembered, in reviewing the conduct of The Bank, that:

1. The acceleration clause was to operate only when The Bank believed that the collateral was insufficient to cover the indebtedness of Brokers.

2. In such event, it was the duty of Brokers either to reduce the indebtedness or to deposit additional collateral within two hours after oral demand or twelve hours after written demand.

3. In the event the indebtedness was not reduced, or additional collateral was not deposited within the stated times, the debt was to become immediately due and payable.

However, what The Bank actually did was this: First, on March 3, 1972 it requested payment of the entire $250,000 principal plus accrued interest. (App. 53a). The Bank was not thereby claiming that the entire principal sum was due by reason of a deficiency in security but rather because of default in interest payments. As soon as it notified Northwestern of the default in interest, interest was paid immediately and the default cured as The Bank concedes. Petition for Writ of Certiorari at 4.

Next, The Bank wrote to Brokers by letter dated March 8, 1972 (App. 55a) requesting Brokers to present not a cash payment in reduction of indebtedness nor an increase in the security over and above the $250,000 bond, but with an "extension" of Northwestern's same bond, in the same amount of $250,000, the term of which would begin when the term of the then-current bond expired.

Obviously, therefore, so long as the initial bond remained in effect, The Bank deemed it sufficient to cover the entire indebtedness and therefore did not regard the acceleration clause as operative. Indeed, in demanding the

new bond, The Bank on March 8, 1972 requested Brokers to present it to The Bank "no later than Tuesday, March 14, 1972." (App. 55a) However, if The Bank had regarded the acceleration clause as applicable, it would have demanded additional collateral according to its rights under the acceleration clause, to wit, 24 hours after the demand made on or about March 8, 1972 or, in any event, certainly no later than March 14, 1972.

But it certainly did not regard that clause as applicable here because on March 15, 1972, it had its attorneys write to Northwestern giving notice of the default in interest payments only and calling upon Northwestern only to cure the default in payments within ten days "and thereby preserve all of Principal's rights, which in that event, shall remain in full force and effect." (App. 57a). If the acceleration clause had been deemed applicable, of course, The Bank would have deemed the entire principal sum due and would have demanded from Northwestern not the interest payment alone but the entire $250,000 as well. It might even have requested the posting of additional collateral or an extension of the bond. But it did none of these.

As noted above, however, Northwestern paid the interest then due and the default was thereby cured, Brokers' rights remaining in full force and effect. At that time, then, there was no default under the note.

Then, by letter dated April 5, 1972 (App. 60a), The Bank wrote to Brokers to point out that the note would expire by its terms on April 7, 1972, and to state that "due to *the* default in the note . . ., we do not wish to extend the loan". (emphasis added). Of course, the only default until that time had been the default in payment of interest. The Bank neither recognized, cited, nor alluded to any other event of default before nor after the default in the payment of interest. Therefore, Brokers' right to

renew the note remained intact and by letter of April 6, 1972 (App. 64a), Brokers paid the interest then due and renewed the note.

However, The Bank returned the interest check stated that "due to the default in the note, we do not wish to extend the loan," and alluded, again, to the prior default in the payment of interest. (App. 65a) Yet The Bank had never relied upon, referred to nor so much as averted to any default other than that in the payment of interest. Hence, The Bank clearly recognized that the acceleration provision had no application to the facts at issue. The value of the collateral had never, in its judgment, become insufficient to cover the entire indebtedness required by the note. Nor had it ever demanded a reduction in the debt or an increase in the $250,000 bond. Nor, finally, did it ever say, suggest, or act with the idea that the clause had operated to make the entire $250,000 due in the time period set forth in the note itself. Indeed, its demand for a renewal of the note made March 8 should have rendered the note due no more than 24 hours thereafter. However, even a full week later, demand on Northwestern was not for the payment of the $250,000 principal, but only for the interest arrears for November 1971 through March 1972.

The Bank's actions and words were completely inconsistent with any such theory, and it is therefore evident that The Bank never intended, any more than did Brokers or Northwestern, for the acceleration provision to apply to these facts as the lower court applied it.

Therefore, it is respectfully submitted that the Court of Appeals' assessment of the facts of the case and reversing of the lower court were in accord with the language of the subject documents and the acts of the parties, and present no occasion for this Court's review.

V. CONCLUSION

For all of the foregoing reasons, respondent Northwestern National Insurance Company respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN R. MCCONNELL
JOSEPH H. HUSTON, JR.
Attorneys for Respondent
Northwestern National Insurance
Company

Of Counsel:
MORGAN, LEWIS & BOCKIUS
2100 The Fidelity Building
Philadelphia, Pa. 19109
(215) 491-9413